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No.

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

METROPOLITAN COUNTY BOARD OF EDUCATION OF NASHVILLE AND DAVIDSON COUNTY, TENNESSEE, *et al.*,
Petitioners,

VS.

STATE OF TENNESSEE, *et al.*,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether the Eleventh Amendment prohibits a district court from allocating the costs of a local desegregation plan to state defendants who originally mandated unconstitutional segregation by state Constitution and statutes.

2. Whether a district court's allocation of local desegregation costs to state defendants is an impermissible exercise of federal equity jurisdiction and an impermissible intrusion upon state legislative authority.

3. Whether a state and its agencies may fulfill their affirmative responsibilities under the Fourteenth Amendment to eliminate the vestiges of state-imposed and maintained segregation by merely removing the segregative statutes and constitutional provisions and shifting the entire burden of desegregation to local school districts and their students.

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Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

The petitioners, Metropolitan County Board of Education of Nashville and Davidson County, Tennessee, *et al.*, respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Sixth Circuit entered in this proceeding on December 30, 1987 (Rehearing Petition denied March 15, 1988).

OPINIONS BELOW

The opinion of the Court of Appeals (reprinted in the Appendix at A. 1) is reported at 836 F.2d 986 (6th Cir. 1987). The opinion of the Court of Appeals reverses the district court's opinion, *Kelley v. Metropolitan County Board of Education of Nashville and Davidson County, Tennessee, et al.*, 615 F. Supp. 1139 (M.D. Tenn. 1985) (reprinted as Appendix D at A. 31).

In addition, the most recent opinions from the Sixth Circuit Court of Appeals and from the district court relating to the scope and need for additional remedial relief in this desegregation case are reprinted in the appendix, to wit: *Kelley v. Metropolitan County Board of Education*, 687 F.2d 814 (6th Cir. 1982) (Appendix E); *Kelley v. Metropolitan County Board of Education*, 511 F. Supp. 1363 (M.D. Tenn. 1981) (Appendix F); *Kelley v. Metropolitan County Board of Education*, 492 F. Supp. 167 (M.D. Tenn. 1980) (Appendix G); *Kelley v. Metropolitan County Board of Education*, 479 F. Supp. 120 (M.D. Tenn. 1979) (Appendix H).

JURISDICTION

The judgment of the Court of Appeals for the Sixth Circuit was entered on December 30, 1987, and a petition for rehearing *en banc* was denied by the Court of Appeals on March 15, 1988 (A-29). This Court's jurisdiction is invoked pursuant to 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

The Eleventh Amendment to the United States Constitution provides that:

> The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

The Fourteenth Amendment to the United States Constitution provides in relevant part:

> No state shall. . .deny to any person within its jurisdiction the equal protection of the laws.

TENNESSEE CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Constitution of 1870, Article 11, Section 12:

> . . .No school established or aided under this section shall allow white and negro children to be received as scholars together in the same school. . . .

T.C.A. §49-3701 provided until March 15, 1979:

> Interracial schools prohibited. — It shall be unlawful for any school, academy, college or other place of learning to allow white and colored persons to attend the same school, academy, college or other place of learning.

T.C.A. §49-3702 provided until March 15, 1979:

> Teaching of mixed classes prohibited. —It shall be unlawful for any teacher, professor, or educator in any college, academy, or school of learning, to allow the white and colored races to attend the same school, or for any teacher or educator, or other person to instruct or teach both the white and colored races in the same class, school, or college building, or in any other place or places of learning, or allow or permit the same to be done with their knowledge, consent or procurement.

T.C.A. §49-3703 provided until March 15, 1979:

> Penalty for violations. — Any person violating any of the provisions of this chapter, shall be guilty of a misdemeanor, and, upon conviction, shall be fined for each offense fifty dollars ($50.00), and imprisonment not less than thirty (30) days nor more than six (6) months.

Michie's Tennessee Code of 1938, Section 2377 provided:

> Schools designed for children; separate schools for white and negro children. The county board of education shall designate the [elementary] schools which the children

shall attend: provided, that separate schools shall be established and maintained for white and negro children. (1925, Chapter 115, Section 13.)

Michie's Tennessee Code of 1938, Section 2393(9) provided:

Who admitted to high school: separation of white and colored pupils — Junior high schools sharing in the state and county high school funds shall be open without tuition to all children of the county; provided, that only those who have completed the eight grades of the elementary school or their equivalent shall be admitted to junior high schools of form one; and that those who have completed the six grades of the elementary school, or their equivalent, shall be admitted to junior high schools of form two or of form three; senior high schools of four grades shall be open to all children of the county who have completed the eight grades of the elementary school or their equivalent; and senior high schools of three grades shall be open to all children of the county who have completed the ninth grade, or its equivalent, in a junior high school; provided that separate schools shall be maintained for white and negro pupils. (1931, Chapter 71, Section 1.)

T.C.A. §49-6-3109 (b)(1) provides:

Unlawful discrimination.

. . .

(b)(1) No student shall be assigned or compelled to attend any school on account of race, creed, color or national origin, or for the purpose of achieving equality in attendance or increased attendance or reduced attendance, at any school, of persons of one or more particular races, creeds, colors or national origins.

T.C.A. §49-6-2101 (f)(1) provides:

Power of boards to provide transportation.

. . .

(f)(1) No board of education shall use or authorize the use of any school transportation facilities for the purpose of achieving a racial balance or racial imbalance in any school by requiring the transportation of any student or pupil from one school to another or from one school district established for his neighborhood to another.

STATEMENT OF THE CASE

This case involves the district court's power to order the State of Tennessee, its Governor, Commissioner of Education, and the State Board of Education, to fulfill their continuing constitutional duty to eliminate lingering vestiges of segregation in the Nashville, Davidson County public school system (Davidson County) imposed and supported by the State of Tennessee,[1] and

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[1] When *Brown v. Board of Education*, 347 U.S. 483 (1954) was decided, it was a state crime for local school officials in Tennessee to permit black and white children to attend school together, and constitutional provisions and civil statutes required segregation. Following *Brown*, Davidson County and others asked for help in developing desegregation plans. To these requests the Commissioner and state agencies responded through the Attorney General that segregation was no longer a state problem, it was a local one, and it was simply up to the local school districts to comply with the mandates of *Brown*. 615 F.Supp. at 1143 (A. 34-37). Article 11, Section 12, Tennessee Constitution; statutory provisions, p. 3-5, *supra*.

With no guidance from the state, the Nashville school board developed a desegregation plan which constituted "a reasonable start toward complete integration." *Kelley v. Board of Education of the City of Nashville*, 2 Race Rel. L. Rptr. 21 (1957).

However, at the same time, the Governor supported several bills which were designed to impede the desegregation process at the local level. After their passage, citizens petitioned the Nashville Board of Education to use these statutes and to disavow its previous plan, and the Board petitioned the district court regarding their use. *Kelley v.*

the district court's power to effectuate that order by requiring state participation in the funding of expensive transportation and educational remedies designed to eliminate those remaining vestiges. The Court of Appeals for the Sixth Circuit has severely limited the district court's power, placing itself directly in conflict with decisions from this Court and from the Seventh and Eighth Circuit Courts of Appeal.

In 1981 the district court in this case sought to eliminate the remaining vestiges of state-imposed segregation in Davidson County by balancing the high cost and relative benefits of busing and educational components of a desegregation plan with the limited budget of the school district which had for ten years

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Board of Education of the City of Nashville, 3 Race Rel. L. Rptr. 970, 972 (M.D. Tenn. 1958) (pupil preference statutes). The state appeared as *amicus curiae* and argued that it was premature to consider the constitutionality of these statutes until Nashville had actually submitted a plan based on the statutes. *Id.* at 973. The state later helped to defend this unconstitutional plan in court. *Kelley v. Board of Education of the City of Nashville*, 159 F.Supp. 272 (M.D. Tenn. 1958), *aff'd* 270 F.2d 209, *cert. denied*, 361 U.S. 924 (1959).

After *Green v. School Board of New Kent County*, 391 U.S. 430 (1968), and *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1 (1971), the plaintiffs filed motions for further relief, and the district court ordered a comprehensive busing plan for Nashville. *Kelley v. Metropolitan County Board of Education*, 463 F.2d 732 (6th Cir. 1972). Just as it did immediately following *Brown*, the state legislature moved quickly after the imposition of mandatory busing by the Supreme Court in *Swann* to provide escape valves for the state and also havens for those opposed to desegregation. T.C.A. §49-6-2101(f)(1) provided that funds would be withdrawn from any school system which transported children for purposes of achieving a racial balance; T.C.A. §49-6-3109(b)(1) prohibited local school boards from zoning their systems to achieve racial balance. Coming as they did on the heels of Nashville's 1971 busing order when tensions were high, this action added fuel to those speaking out loudly against desegregation. At the same time the State Board of Education in Nashville was passing resolutions condemning mandatory busing, first in 1971 and then in 1982. 615 F.Supp. at 1143-44, 1148-51 (A. 34-37, 46-56).

trimmed and eliminated school programs to fund millions of dollars in first-priority fixed desegregation expenses. 492 F.Supp. at 192 (A. 173-74); 615 F.Supp. at 1142 (A. 32); (A. 208-12). The Court of Appeals in 1982 rejected the district court's balancing approach ordering a new plan including *both* significantly increased transportation in this 533 square mile county *and* the expensive educational components, including smaller classes, transition grades, remediation, black studies, magnet schools, middle school curriculum, and extensive teacher training. 511 F.Supp. at 1368-71 (A. 108-14); 687 F.2d at 816-17 (A. 64).

The state defendants were included as parties prior to consideration and approval of this new plan. In 1985 the district court ordered the state defendants to eliminate these lingering vestiges by participating in the desegregation plan crafted by it pursuant to the Court of Appeals' mandate. 615 F.Supp. 1139 (A.31). In 1987, the Court of Appeals' reversed the district court, holding that the Eleventh Amendment barred the action against the state defendants, and that the district court's order constituted an impermissible exercise of federal equity jurisdiction. 836 F.2d 986 (A. 1).

This decision is contrary to the holdings of this Court in school desegregation cases that a state must act affirmatively to eliminate all lingering vestiges of its prior unconstitutional conduct, *Green v. County School Board of New Kent County*, 391 U.S. 430, 435-36 (1969); *Columbus Board of Education v. Penick*, 443 U.S. 449 (1979), *Dayton Board of Education v. Brinkman*, 443 U.S. 526 (1979). This holding also conflicts with this Court's holding in *Milliken v. Bradley*, 433 U.S. 267 (1977) (*Milliken II*), that the Eleventh Amendment is no bar to requiring state monetary participation in local desegregation remedies designed to eliminate vestiges of state-imposed segregation. The holding of the Court of Appeals also conflicts with the cases from the Seventh and Eighth Circuits rejecting Eleventh

Amendment defenses and requiring state defendants to participate in the funding of local school desegregation plans.[2]

A. The Historical Underpinnings of the District Court's Order Requiring the State Defendants to Fund a Portion of the Desegregation Plan.

In 1971, pursuant to *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1 (1971), the District Court for the Middle District of Tennessee designed the first comprehensive desegregation plan for Davidson County, emphasizing extensive busing of students to achieve racial balance. 492 F.Supp. at 170-72 (A. 127-30). Following several years of implementation of the plan, the plaintiffs filed motions for further relief, requesting extensive and expensive remedial and educational programs, and complaining of growing racial imbalance in the city's inner core and in growth of schools on the fringes of the county excluded as too distant for busing by the 1971 order. Upon hearing all matters, the district court found that lingering vestiges of state-imposed segregation remained in the form of

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[2] *E.g. United States v. Board of School Commissioners of Indianapolis*, 677 F.2d 1185 (7th Cir.), *cert. denied*, 459 U.S. 1086 (1982); *Little Rock School District v. Pulaski County Special School District*, 778 F.2d 404, 435-36 (8th Cir. 1985), *cert. denied*, 106 S.Ct. 292 (1986); *Little Rock School District v. Pulaski County Special School District*, 839 F.2d 1296 (8th Cir. 1988); *Liddell v. Board of Education of St. Louis*, 667 F.2d 643 (8th Cir.), *cert. denied*, 459 U.S. 877 (1982); *Liddell v. Board of Education*, 839 F.2d 400 (8th Cir. 1988); *Jenkins v. Missouri*, 672 F.Supp. 400 (W.D. Mo. 1987) (now on appeal); *Jenkins v. Missouri*, 593 F.Supp. 1485 (W.D. Mo. 1984), *aff'd in part*, 807 F.2d 657 (8th Cir. 1986).

See also the cases from the Court of Appeals for the Sixth Circuit ordering states to pay significant local desegregation costs, to wit: *Penick v. Board of Education*, 583 F.2d 787 (6th Cir. 1978), *aff'd* 443 U.S. 449 (1979); *Reed v. Rhodes*, 500 F.Supp. 404 (M.D. Ohio 1980), *aff'd* 662 F.2d 1219 (6th Cir. 1981), *cert. denied*, 455 U.S. 1018 (1982); *United States v. School District of Ferndale*, 577 F.2d 1339 (6th Cir. 1978); *Oliver v. Michigan State Board of Education*, 508 F.2d 178 (6th Cir. 1974).

significantly lower achievement of black students and continuing racially identifiable schools. The district court ordered implementation of extensive remedial programs. To fund these remedial programs, the district court ordered the redrawing of the countywide desegregation busing plan, decreasing the busing and racial balance at the early grades and maximizing busing and racial balance in the upper grades. 492 F.Supp. at 192, 196 (A. 172-74, 182); 511 F.Supp. at 1368-71 (A. 108-14).

In 1982, the Court of Appeals reversed the district court and ordered the implementation of an entirely new desegregation plan, including *not only* widely expanded busing designed to eliminate all schools falling outside an acceptable racial range, *but also* the expensive educational and remedial components of the plan that had been considered by the district court. 687 F.2d 814 (A. 59). The Court of Appeals did not mention in its holding that the district court had provided funding of the educational components through decreased transportation. Prior to this hearing in the Court of Appeals the state defendants had been named as parties in a third party complaint by the local Board of Education, yet they declined to actively participate in any hearings or in the redrawing of plans.

In issuing its 1982 order requiring the new plan, the Court of Appeals found it unnecessary to examine whether intentional segregative devices had been employed. Rather, it was Tennessee's history of *de jure* segregation, without more, that warranted a new remedy when lingering vestiges of the state's prior policies remained.[3] The Court of Appeals traced the legislative history of *de jure* segregation in Tennessee, finding that the ef-

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[3] The Court of Appeals stated as follows:

> In 1955, when litigation aimed at desegregating the Nashville schools began, racial segregation was constitutionally and statutorily mandated in Tennessee, and the school board was in full compliance with those provisions. . . . [I]t was not until 1978 that Tennessee's Constitution was amended to delete the requirement of separate schools. Finally, effective March 15, 1979, more than 20 years after the laws were declared unconstitutional, the Tennessee legislature repealed the old school segregation statutes.

fects of state-imposed segregation had yet to be eliminated. On January 24, 1983, this Court denied the Board's petition for certiorari from the Sixth Circuit's decision.

In the 1983-84 school year, while the state defendants were actual parties, yet nonetheless silent parties, the district court ordered implementation of the new plan requiring extensive remediation and educational components along with county-wide busing in the 533 square mile county. These plans were estimated to cost approximately $6 million per year, or approximately three times the annual cost in the past.[4]

B. The District Court's Order Requiring the State Defendants to Fulfill Their Affirmative Responsibilities to Eliminate the Remaining Vestiges of State-Imposed Segregation.

In 1985 the district court, relying on this Court's opinions in *Milliken v. Bradley*, 433 U.S. 267 (1977), *Columbus Board of*

> It therefore is clear that when the first "comprehensive and potentionally effective desegregation order" was entered in this case in 1971, the existing racial separation in the Nashville schools had resulted from *de jure* segregation. And despite the 1971 plan's potential, the record establishes and the district court found that desegregation in the Nashville schools has never been achieved. Thus, the effects of state-imposed segregation have yet to be eradicated.

687 F.2d at 815 (A. 61-62).

[4] Between 1971 and 1982 the estimated cost of the first comprehensive desegregation plan totaled approximately $20 million. The estimated annual recurring cost of the new plan was $6 million, with start-up costs for the first year estimated to be $9 million. 615 F.Supp. at 1141 (A. 32). These figures for the new plan *did not include* the following: an undetermined amount for the Martin Luther King Magnet School for the Health Sciences, and the building of two new comprehensive high schools, Goodlettsville-Madison, and Pearl-Cohn at an estimated cost of $29 million. Payment on the bonds for these buildings is estimated to be approximately $2.93 million per year in addition to the $6 million set forth above. Amended Third Party Complaint, Record in Court of Appeals, 74; Court of Appeals Appendix, 1046.

Education v. Penick, 443 U.S. 449 (1979), and *Dayton Board of Education v. Brinkman*, 443 U.S. 526 (1979), found that the state defendants had an unmet continuing affirmative duty to eliminate all remaining vestiges of historical state-imposed segregation, a duty which could not be met by the mere abandonment of prior discriminatory conduct. Since the Court of Appeals and the district court had previously found such vestiges remaining, the district court, following not only *Milliken, supra,* but numerous other circuit court and district court opinions,[5] required the state defendants to participate in providing a remedy which could not be fully implemented from Davidson County's resources.[6] Specifically, the court ordered the state defendants to pay for 60 percent of the annual recurring costs of desegregation, which was approximately the percentage increase in annual non-capital desegregation expenses under the new comprehensive plan ordered by the Court of Appeals.[7] The remedy was tailored to eliminate those vestiges of

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[5] See n. 2, *supra*.

[6] The district court stated: "[T]he order . . . is responsive to the constitutional violations and injuries that have occurred. The infusion of state funds into the Metro desegregation effort will permit Metro to offer those remedial plans which currently are part of the comprehensive remedial plan but presently are not offered because of insufficient funding. The effects of past discrimination continue to be manifested in many school age black children in terms of levels of performance on standardized testing, development of effective communication skills, and the ability to earn high school and higher education degrees. The present desegregation plan seeks to ameliorate those conditions. The payment of state funds to finance the remedial programs seek to improve the educational opportunities for black children so as to permit them to achieve a level of academic performance that reasonably could be expected had the black population not been subjected to long term segregation in public education. Finally, the court believes that the impact on the state treasury will not unduly infringe on the state's ability to carry on traditional state functions. The remedy is not intrusive on the autonomy of state officials to exercise discretion over state affairs." 615 F.Supp. at 1154 (A. 57-58).

[7] See n. 4, *supra*.

discrimination which had been imposed by state statute and constitutional provision prior to *Brown*, and which the district court and Court of Appeals previously found were fostered by the state's actions and inactions following *Brown*. *Kelley v. Metropolitan County Board of Education*, 615 F.Supp. 1139 (M.D. Tenn. 1985) (A. 31); see n. 1, *supra*.

C. The Opinion of the Court of Appeals Requiring Dismissal of the State Defendants.

A panel of the Court of Appeals[8] reversed the district court's grant of partial summary judgment to the local Board and ordered outright dismissal of the complaint against the state defendants on four grounds: first, the panel rejected the position of the Seventh and Eighth Circuits, and held that the action was barred by the Eleventh Amendment to the Constitution of the United States; second, the panel relied on a *dissenting* opinion in *United States v. Board of School Commissioners of Indianapolis*, 677 F.2d 1185, 1190 (7th Cir.) (Posner, J. dissenting), *cert. denied*, 459 U.S. 1086 (1982), and held that the order was an impermissible exercise of federal equity jurisdiction; third, the court held that the issue concerned merely an internal controversy between state political subdivisions, although the original plaintiffs had sought to file briefs supporting the local Board's efforts to assure quality education for all students, and the programs funded under the district court order would

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[8] The panel consisted of Circuit Judges Engel, Nelson, and Ryan. The 1982 order requiring a new desegregation plan was entered by another panel: Circuit Judges Edwards, Jones, and Celebrezze, 687 F.2d 814 (6th Cir. 1982) (Celebrezze dissenting), *cert. denied*, 459 U.S. 1183 (1983).

directly benefit minority children;[9] fourth, in the panel's opinion, the board had waited too long to bring in the state defendants, although the state defendants were included before the expanded desegregation remedy tailored to remove all remaining lingering vestiges of state-imposed segregation was developed and ordered, and the state defendants were not shown to be prejudiced in any way by the passage of time during which the local board and its students shouldered the entire financial burden of desegregation.[10]

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[9] The Court of Appeals' opinion relies upon *South McComb Disposal Authority v. Township of Washington*, 790 F.2d 500 (6th Cir. 1986), for the proposition that a federal court should not intervene between a state and its local government. Davidson County respectfully submits that it is not seeking relief against the Tennessee defendants "in its own right" as the panel suggests pursuant to *South McComb*. Instead, Metro is diligently seeking to implement fully the desegregation plan the district court and presumably the Court of Appeals deem appropriate to remedy the vestiges of segregation and continue to provide quality education to all of its students. If Metro cannot step into the shoes of the plaintiffs for these purposes (see *Akron Board of Education v. State Board of Education of Ohio*, 490 F.2d 1285 (6th Cir. 1984)), and protect their rights along with the rights of all other school children in Nashville, then plaintiffs everywhere will be required at great expense to continually litigate their constitutional rights in order to assure themselves of complete remedies and quality education.

[10] The Court of Appeals merely mentioned the concept of laches and adopted it without discussion, never asserting how the state defendants could have been injured by the delay and never discussing where fairness and equity fit into the application of the doctrine. 836 F.2d at 1000 (A. 27). As in the St. Louis case, fairness dictates that the "primary constitutional wrongdoer" shoulder some of the burden of eliminating the vestiges of discrimination. *Liddell v. Board of Education of the City of St. Louis*, 491 F.Supp. 351, 359 (E.D. Mo. 1980). Certainly, the burden should not be borne alone by students in the local school system, particularly given Davidson County's tight budget constraints after the 1982 order. The state defendants have had an opportunity to provide input into the desegregation plan, and they have repeatedly refused to do so. Thus, no prejudice can be asserted by them.

REASONS FOR GRANTING THE WRIT

I.

The Court of Appeals Ignored the Precedent of this Court By Dismissing All Claims Against the State Defendants, Who Have an Admitted but Unmet Affirmative Duty to Eliminate the Lingering Vestiges of State-Imposed Segregation in Davidson County

The Court of Appeals recognized that Tennessee has an affirmative duty to eliminate the vestiges of state-imposed segregation. 836 F.2d at 994 (A. 15). However, under its ruling, the mere removal of pre-*Brown* statutory and constitutional provisions is sufficient to meet this duty. This approach deviates from this Court's mandate that a state eliminate all such vestiges, and that as long as these vestiges remain, the state defendants are continuing to violate the Constitution. *Green v. County School Board of New Kent County*, 391 U.S. 430, 435-36 (1968), *Dayton Board of Education v. Brinkman*, 443 U.S. 526, 538 (1979); *Columbus Board of Education v. Penick*, 443 U.S. 449, 458-59 (1979).[11]

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[11] In one portion of its opinion, the Court of Appeals' appears to state that no vestiges of state-imposed segregation remain in Nashville — that remaining vestiges are at this date likely caused by "the imbalance in residential patterns", quoting *Austin Independent School District v. United States*, 429 U.S. 990, 994 (1976) (Powell, J. concurring in grant of certiorari). 836 F.2d at 994 (A. 15). The Court of Appeals cites nothing from the record to indicate that only residential patterns are to blame for remaining vestiges, particularly lowered achievement scores of black students. Indeed, such a holding would be blatantly inconsistent with the Court of Appeals' own previous order in 1982, 687 F.2d 814, and would warrant at once a dismissal of the entire lawsuit in Davidson County based upon the county's achievement of unitary status. The Court of Appeals' 1982 order required a new desegregation remedy to eliminate the lingring effects of state-imposed segregation. Significantly, the Court of Appeals never addresses, much less finds clearly erroneous, its own opinions and those of the district court that vestiges of state action in the form of educational deficiencies and resegregation remain to be corrected in Davidson County.

In this case, the district court found that the state had done nothing to eliminate the vestiges of segregation. Indeed, the district court found that following *Brown*, the state, through statutes and public pronouncements, not only failed to provide leadership, but in fact had helped fuel desegregation furor.[12] The Court of Appeals' opinion discounts this conduct without indicating that the district court's findings are clearly erroneous, and does not state how this conduct can be consistent with a state's affirmative constitutional responsibility. It is simply impossible to reconcile the Court of Appeals' opinion with *Green, Dayton,* and *Columbus, supra.*

Indeed, it is impossible to reconcile the Sixth Circuit's opinion with other Sixth Circuit holdings pursuant to this Court's precedent ordering state participation, particularly *Penick v. Columbus Board of Education*, 663 F.2d 24 (6th Cir. 1981) and *Reed v. Rhodes*, 662 F.2d 1219 (6th Cir. 1981). In these cases, Ohio, which had not mandated segregation prior to *Brown*, was required to participate in expensive desegregation remedies only because it knew of local segregated conditions, structured its administrative procedures in such a way as to avoid dealing with segregation, treated segregation differently from other aspects of school conditions, and continued to fund segregated school systems. When read alongside *Penick* and *Reed*, the panel's opinion places upon Ohio a greater "affirmative duty" than Tennessee, which had initially required Davidson County by criminal statute and constitutional provision to segregate its schools. In the words of the St. Louis desegregation case, Ten-

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[12] 615 F.Supp. at 1143-44, 1148-51 (A. 34-37, 45-57); see n. 1, *supra.*

nessee, like Missouri,[13] stands before the federal courts as a "primary constitutional wrongdoer" which has done absolutely nothing for the minority children who today bear the burden of its wrongdoing.

In effect, the Sixth Circuit permits states which impose segregation to avoid taking a positive role by enunciating a hands-off policy designed to place the entire onus on local school systems having high percentages of minority children, while simultaneously permitting the same officials to voice opposition and to oppose by statute the means needed by local boards to achieve desegregation. The Court of Appeals has merely given lip service to this Court's long-standing concept of affirmative duty, and has accepted the state's elimination of offending statutes and constitutional provisions in 1979 as both the beginning and end of its obligation to the victims of discrimination.

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[13] *Liddell v. Board of Education of the City of St. Louis*, 491 F.Supp. 351, 359 (E.D. Mo. 1980). See later opinions reaffirming and expanding state liability, p. 21, *infra*.

The facts in the St. Louis case are remarkably similar to Nashville. In both cases, state statutes and constitutional provisions mandating segregation were in force at the time of *Brown* and were not stricken until many years later — in Missouri in 1976 and in Tennessee in 1979. In both cases, a state government officer or entity had declared the unconstitutional statutes invalid after *Brown*. Further, in both cases the city school system was the only party defendant for several years. Based on these facts, the district court held that Missouri was a "primary constitutional wrongdoer" which must do more than abandon its prior discriminatory conduct. *Id.*

The Nashville case is an even stronger case for liability than *Liddell*. Nowhere in the opinions from the Eighth Circuit or the district court is there any hint of actions taken by the state after *Brown* to thwart desegregation in local school systems. In Tennessee, after almost every major decision concerning desegregation, the state spoke out against desegregation, through laws and policies. 615 F.Supp. at 1144, 1148-50 A. 34-37, 45-57); see n. 1, *supra*.

II.

The Court of Appeals' Opinion Conflicts With *Milliken v. Bradley*, 433 U.S. 267 (1977) (*Milliken II*) and With Decisions From the Courts of Appeal for the Seventh and Eighth Circuits Which Have Rejected the Eleventh Amendment as a Defense to State Responsibility for Local School Desegregation Plans

In *Milliken II*, the state defendants argued that the Eleventh Amendment barred any order requiring them to pay one-half of the desegregation costs for Detroit, contending that such an order was in practical effect an award of money damages against the state based upon the prior misconduct of state officials which was contrary to this Court's holding in *Edelman v. Jordan*, 415 U.S. 651 (1974). This Court rejected that argument, holding that the components of the desegregation plan to be paid for by Michigan were designed to eliminate the remaining vestiges of state-imposed segregation. Those components ordered into effect prospectively were "designed to wipe out continuing effects of inequality produced by the inherently unequal dual school system long maintained by Detroit." *Id.* at 289-90. The case was not a lawsuit for damages against Michigan which was barred by the Eleventh Amendment. Rather, the programs for which the state defendants were to provide funds would help to restore the victims of unlawful past state conduct to a position of equality in the future, rather than simply compensating them for unconstitutional conduct completed in the past.

Since *Milliken II*, the prospective compliance exception to the Eleventh Amendment has been utilized regularly in desegregation cases, particularly with the growing round of expensive new desegregation remedies, requiring not only extensive cross-town busing, but also concentrated and expensive efforts to improve the quality of education for victims of discrimination. The Eighth Circuit Court of Appeals and its district courts have rejected Missouri's and Arkansas' Eleventh Amendment defenses

to state liability, *e.g. Liddell v. Board of Education*, 667 F.2d 643 (8th Cir.), *cert. denied*, 459 U.S. 877 (1982); *Liddell v. Board of Education*, 839 F.2d 400 (8th Cir. 1988); *Little Rock School District v. Pulaski County Special School District*, 839 F.2d 1296 (8th Cir. 1988); *Jenkins v. Missouri*, 672 F.Supp. 400 (W.D. Mo. 1987) (now on appeal). In addition, the Seventh Circuit Court of Appeals has rejected Indiana's Eleventh Amendment defense in the Indianapolis case. *United States v. Board of School Commissioners of Indianapolis*, 677 F.2d 1185 (7th Cir.), *cert. denied*, 459 U.S. 1086 (1982). The Sixth Circuit admits in its opinion that there is a split among these circuits concerning this critical issue[14] which begs definitive resolution, given the frequency with which it is arising, and the millions of dollars in local desegregation costs now being paid by states in other circuits.

In holding contrary to other circuits, the Court of Appeals relies upon a number of cases which do not involve desegregation remedies nor the concept of continuing constitutional violation.[15] In particular, the Sixth Circuit relies heavily on

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[14] The Sixth Circuit cites the Seventh and Eighth Circuit opinions and indicates that the circuits are divided. 836 F.2d at 995, n. 4 (A. 17). The court then states "[n]one of the court of appeals opinions we have examined can be said to demonstrate convincingly that the Supreme Court's sovereign immunity decisions do not mean what they seem to say."

The court also attempts to downplay the Seventh Circuit's rejection of the state's Eleventh Amendment defense by noting that the United States is a party to that case. *Id.* A review of the opinions in Indianapolis will indicate clearly that the United States is nothing more than a nominal party in the inter-district phase of the lawsuit, and the order requiring state financing was entered on the motion of the local school district in Indianapolis, not on the motion of the United States. *See United States v. Board of School Commissioners of Indianapolis*, 677 F.2d 1185 (7th Cir.), *cert. denied*, 459 U.S. 1086 (1982).

[15] *E.g. Louisiana v. Jumel*, 107 U.S. 711 (1883); *Welch v. State Department of Highways*, 483 U.S. ____, 107 S.Ct. 2949, 97 L.Ed.2d 389 (1987); *Green v. Mansour*, 474 U.S. 64 (1985).

Papason v. Allain, 478 U.S. ____, 92 L.Ed.2d 209 (1986), for the proposition that the Eleventh Amendment bars actions against state defendants unless there is an ongoing constitutional violation found. In that case the school board brought an action against Mississippi, attacking the state's distribution of federal land grant funds for the benefit of public schools. Insofar as the claim was deemed to be one for a one-time restoration of the lost corpus of the funds, this Court held that the action was barred as one for "an accrued monetary liability" contrary to *Milliken II*. However, the plaintiffs had also asserted an equal protection claim challenging the distribution of school lands — a continuing violation for which *Milliken* and *Ex Parte Young*, 209 U.S. 123 (1908), provided a remedy. This Court allowed that action to be maintained since it challenged " the present disparity in the distribution of the benefits of state-held assets and not the past actions of the state." 92 L.Ed.2d at 229. Thus, it appears that *Papason* merely reiterates the rules and rationale set forth initially by this Court and the Sixth Circuit in *Milliken II*.

The concept of continuing violation — involving a *current disparity* is what is presented in this case and in those desegregation cases from the Seventh and Eighth circuits which rely on *Milliken II*.[16] The minority school children of Davidson County are performing on significantly lower levels than the white school children. Racial imbalance in school zones has also per-

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[16] The Court of Appeals seeks to distinguish *Milliken II* from this case, writing that "the payment of money was not *perceived* to be all that was required of the state defendants in *Milliken*" — that the state and Detroit officials were required to put into effect certain programs. 836 F.2d at 991 (A. 10). Such a distinction not only lacks substance, it ignores reality. In neither *Milliken* nor any of the cases from other circuits have the state defendants been more than recalcitrant financial participants. The simple fact is that local school systems in Missouri, Michigan, Arkansas, and Indiana have administered the desegregation programs ordered, with the various states simply contributing financial support — support that is directed to eliminating the current disparity caused by state-imposed segregation.

sisted. These vestiges of discrimination do not vanish overnight. They are current disparities — current vestiges. Where current disparities exist, there is a continuing constitutional violation and a concomitant affirmative duty. As this Court stated in *Milliken*:

> These [educational programs] were not, and as a practical matter could not be, intended to wipe the slate clean by one bold stroke. . . . Rather, by the nature of the *antecedent violation*, . . . the victims of Detroit's de jure segregated system will continue to experience the effects of segregation until such future time as the remedial programs can help dissipate the continuing effects of *past misconduct*.

Milliken v. Bradley, 433 U.S. at 290 (emphasis added).

Certainly, to the extent that Davidson County has curtailed educational programs to fund only minimally the desegregation plan ordered by the Sixth Circuit, some strides have been made toward eliminating current disparities. Where those disparities still exist, the Courts of Appeal for the Seventh and Eighth Circuits which have considered the issue would place a heavy burden upon the State of Tennessee. The Sixth Circuit has permitted Tennessee to avoid the obligation, to the detriment of the very students for whom the Sixth Circuit has ordered relief.

Such a distinction not only lacks substance, if sanctioned by this Court it creates an unreasoned and inequitable policy. As indicated, the State of Tennessee has historically abdicated its affirmative duty, placing the entire onus of desegregation efforts on cities having large populations of minority students. Indeed, the state defendants have never lifted a finger to help Metro plan the second generation plan, much less to help implement it. It is little wonder that the district court couched its 1985 order in terms of requiring the state to eliminate the prior vestiges of its segregation actions rather than specifically requiring the state defendants to bus and educate. They had indicated by their silence that they had never intended to do so. Had the district court ordered the state defendants specifically to bus and educate, an order which the district court could certainly have entered, the result would have been the same.

III.

The Court of Appeals' Opinion that State Ordered Participation in Local Desegregation Remedies is an Inappropriate Exercise of Federal Equity Jurisdiction Conflicts with Opinions From the Seventh and Eighth Circuits, Along With its Own Opinions Involving Liability of Northern States for Local Desegregation Efforts

The Sixth Circuit's opinion cites a *dissenting* opinion in *United States v. Board of School Commissioners of City of Indianapolis*, 677 F.2d 1185, 1190-91 (7th Cir.) (Posner, J. dissenting), *cert. denied*, 459 U.S. 1086 (1982) for the proposition that an award of desegregation costs against a state is not an appropriate exercise of federal equity jurisdiction, since the state itself should decide how local school systems will finance their operations. The Court of Appeals' reliance on this dissent indicates, without more, that the Sixth Circuit is in conflict with the Seventh Circuit, which held in the Indianapolis case that "allocating costs of a desegregation plan is, of course, part of the remedial power of the district court", *United States v. Board of School Commissioners for the City of Indianapolis*, 677 F.2d at 1186, *citing Milliken II*, 433 U.S. at 289-90. Using this broad authority, the Seventh Circuit in *Indianapolis* required the state defendants to pay 100 percent of the desegregation costs in Indianapolis, *United States v. Board of School Commissioners for the City of Indianapolis*, 677 F.2d 1185 (7th Cir. 1982). In St. Louis the Eighth Circuit has required Missouri to pay 100 percent of certain costs totaling millions of dollars; *Liddell v. Board of Education of St. Louis*, 801 F.2d 278, 283 (8th Cir. 1986); 731 F.2d 1294, 1305, 1309, 1312 (8th Cir.), *cert. denied*, 469 U.S. 816 (1984); 677 F.2d 626, 642 (8th Cir.), *cert. denied*, 459 U.S. 877 (1982); in Little Rock the Eighth Circuit has also required Arkansas to pay 100 percent of the cost of much of the city's desegregation plan, *Little Rock School District v. Pulaski County Special School District*, 778 F.2d 404, 435-36 (8th Cir. 1985), *cert. denied*, 106 S.Ct. 292

(1986). Significantly, in prior cases the Sixth Circuit itself has ordered payment of substantial local desegregation costs by state defendants, including most pointedly, in Detroit, *Bradley v. Milliken,* 540 F.2d 229, 240, 246 (6th Cir. 1976), *aff'd,* 433 U.S. 267 (1977) (State required to pay 75 percent of the costs of purchasing 150 school buses and 50 percent of the educational components).[17] In none of these cases have these courts, including the Sixth Circuit, adopted the present panel's restricted view of the district court's broad equitable authority.

The well-considered reason for the willingness of these courts to require state funding of local desegregation plans certainly comes from *Milliken II, supra.* As the Sixth Circuit recognized in that case, students in a school system should not be disadvantaged by having their regular educational resources severely affected or curtailed because of the necessity to fund special desegregation costs.[18] Such a result would penalize the very vic-

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[17] *See also Penick v. Columbus Board of Education,* 519 F.Supp. 925, 942 (S.D. Ohio 1981) (state defendants to share equally with Columbus defendants all expenses relating to desegregation), on remand from *Penick v. Columbus Board of Education,* 663 F.2d 24 (6th Cir. 1981); *Reed v. Rhodes,* 500 F.Supp. 404 (N.D. Ohio 1980), *aff'd,* 662 F.2d 1219 (6th Cir. 1981) (state defendants to reimburse local defendants for state's one-half share of desegregation-related expenses incurred so far); *Berry v. School District of Benton Harbor,* 515 F.Supp. 344 (W.D. Mich. 1981), *aff'd and remanded,* 698 F.2d 813 (6th Cir.), *cert. denied,* 464 U.S. 892 (1983) (Michigan required to pay 60 percent of certain educational programs and 100 percent of transportation programs relating to magnet schools).

[18] The Sixth Circuit specifically prohibited this result in requiring Michigan to pay Detroit's desegregation costs;

> Since Michigan officials and agencies were guilty of acts which contributed substantially to the unlawful *de jure* segregation that exists in Detroit, the state has an obligation not only to eliminate the unlawful segregation *but also to insure that there is no dimunition in the quality of education.*

Bradley v. Milliken, 540 F.2d 229, 245 (6th Cir. 1976) (emphasis supplied).

tims of past discrimination which the holdings are designed to benefit. In the instant case, the Court of Appeals has previously ignored the district court's efforts to balance the city's financial resources to insure continuation of quality education as well as desegregation. See discussion *supra*, pp. 8-9. *Now* the Sixth Circuit has rejected the efforts of Davidson County on behalf of the plaintiffs and all of its students,[19] to both desegregate and to educate.[20]

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[19] The Court of Appeals states that the plaintiffs were not parties to this litigation. 836 F.2d at 988 (A. 3). The plaintiffs attempted to file a brief on behalf of the Board of Education, presumably to support Davidson County's efforts to continue to enhance educational quality for all students, including minority students. However, the Court of Appeals refused to permit the plaintiffs to file a brief, indicating upon their motion for extension that they were not parties. Plaintiffs' counsel were present at all arguments and proceedings concerning state liability, and *never withdrew* from this case. If it is left only to plaintiffs' counsel to pursue what is necessary for both desegregation and quality education, then individual plaintiffs will continually be required to resort to expensive litigation to protect their rights. To fault the Davidson County Board of Education for taking up the mantle at this stage to protect the interests of school children, including the plaintiffs, demonstrates the lengths to which the Sixth Circuit has gone in refusing to place the burden for desegregation on those who were responsible for the problem in the first instance.

[20] The Sixth Circuit stated that the Board of Education has never contended that it could not pay for the desegregation remedies. Nothing could be farther from the fact — indeed, the Board's motion for summary judgment upon which the district court ruled demonstrated the severe financial problems that had accompanied the imposition of these remedies and that would accompany the imposition of the new remedies. In a finding that has not been attacked by the state defendants nor reversed by the Sixth Circuit as clearly erroneous, the district court held that shifting this portion of the expenses to the state defendants would permit adequate funding of those expanded educational programs. A. 208-212; 615 F.Supp. at 1154 (A. 57-58).

The Court of Appeals' decision would have Davidson County continue to juggle its budget, "robbing Peter to pay Paul", trimming its programs to only minimally fund the desegregation efforts. Such result is not permitted by *Milliken II*, and has not been required *in any case* considering state responsibility for remaining vestiges of state-imposed segregation. The Sixth Circuit has narrowly defined a district court's authority in this regard, contrary to the decisions of this Court, its own prior decisions, and the decisions of the Seventh and Eighth Circuits.

CONCLUSION

This case presents the Court with a question of national importance. As the years have passed, local desegregation remedies have become increasingly comprehensive and expensive, requiring not only concentration on transportation and racial balance but also upon special educational opportunities for the victims of past discrimination. A growing number of school districts are looking to states which mandated or maintained segregation for help in implementing desegregation plans and in ensuring the continuation of quality education, pursuant to *Milliken II*.

The Sixth Circuit decision in this case begs for review because it fails to apply this Court's oft-repeated concepts of continuing affirmative duty and continuing constitutional violations in desegregation cases, and because it conflicts with opinions in other circuits. The conflict in circuits will lead to confusion across the nation concerning Eleventh Amendment defenses to state participation in desegregation remedies and to confusion in the scope of a district court's traditional broad equitable powers.

Respectfully submitted,

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